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In The

Supreme Court of the United States

October Term, 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF OF *AMICUS CURIAE* CARGO AIRLINE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 49 U.S.C. § 40116(b) (and its predecessor, 49 U.S.C. § 1513(a)) preempts Hawaii Statutes H.R.S. § 237 and/or § 239 to the extent that these state statutes impose a tax on a portion of the gross receipts of an air carrier derived from the sale of air transportation.

2. Whether the definition of "interstate air transportation", 49 U.S.C. § 40102(a)(25) (and its predecessor, 49 U.S.C. § 1301(21)), includes ground services that are an integral element of the services provided.

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I. THE INTEREST OF THE CARGO AIRLINE ASSOCIATION

The Cargo Airline Association (hereinafter "the Association"), a nationwide organization made up of United States all-cargo air carriers, hereby files its *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed in this matter by Petitioner, Lynden Air Freight, Inc. (hereinafter "Lynden").[1]

The Association, formed in 1948, currently represents those air carriers that provide integrated, door-to-door, expedited delivery of packages and freight throughout the world. Association membership includes virtually all U.S. all-cargo airlines and a number of other Associate Members, including airports with an interest in air freight development.

The tax at issue herein will have a direct impact on all Association members operating in Hawaii, and the ripple effect of the tax will impact operations nationwide as other jurisdictions move to impose similar schemes of taxation. Therefore, industry members will be acutely affected by the decision of this Court and have a substantial interest in this proceeding.

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[1] No party hereto authored this Brief in whole or in part, and no person or entity, other than the Cargo Airline Association, its members or its counsel, made any monetary contribution to the preparation or submission of this Brief. Written consent to the filing of this Brief has been obtained from all parties and evidence of such consent has been filed with the Clerk of this Court.

II. STATEMENT OF THE CASE

The Lynden Petition requests that this Court grant certiorari to review a decision of the Supreme Court of the State of Hawaii which held that a federal statute preempting State and Local taxation of gross receipts on the sale of air transportation, 49 U.S.C. § 40116[2], does not bar the State of Hawaii from taxing gross receipts from the sale of air transportation *to the extent that* such gross receipts can be attributed by the State to activities taking place on the ground, rather than in the air.

This Court has previously reviewed this preemption question in the case of *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983), wherein it was held that the Hawaii excise tax on the gross receipts on the sale of air transportation was preempted by 49 U.S.C. § 1513, the predecessor of 49 U.S.C. § 40116. Nevertheless, the State of Hawaii has continued to impose a tax on the gross receipts from the sale of air transportation, at least to the extent that such receipts can be attributed by the State to activities taking place on the ground. Petitioner Lynden Air Freight, Inc. refused to pay the amounts claimed owing by the State of Hawaii and, on May 19, 1997, was assessed over $500,000 for the years 1987 through 1994. Lynden followed the procedures for contesting this assessment and, on January 28, 1998, the Hawaii Tax Appeal Court granted Lynden's Motion for Summary Judgment. The Director of Taxation appealed this ruling,

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[2] Formerly 49 U.S.C. § 1513. The recodification of this section was merely technical and not intended to make any substantive changes in the law. H.R. Rep. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818.

resulting in the decision by the Supreme Court of Hawaii at issue herein. *See Director of Taxation v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998). The instant Petition requests review of this decision.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

A. INTRODUCTION

It is the position of the Cargo Airline Association that the decision of the Supreme Court of Hawaii is erroneous as a matter of law and, if left uncorrected, will have severe consequences on the air transportation of cargo within the United States. Indeed, the decision affects much more than the Petitioner or even the air freight forwarding industry. It impacts **all** providers of air transportation throughout the United States (not only in Hawaii) and is therefore potentially disruptive to the entire U.S. air transportation system. Permitting the decision of the Supreme Court of Hawaii to stand will encourage other jurisdictions to follow suit and will seriously undermine the ability of air cargo companies to provide needed services at an acceptable price. In addition, the Hawaii decision erodes the holdings of this Court in *Aloha Airlines*, 464 U.S. 7, and frustrates the will of the United States Congress, whose intent in enacting 49 U.S.C. § 40116 (and its predecessor, 49 U.S.C. § 1513), was to have a nationwide system of air transportation unfettered by myriad local taxes.[3] Only by granting the

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[3] *See* S. Rep. No. 93-12 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1446.

Lynden Petition for Certiorari can these serious issues be addressed.

B. THE NATIONWIDE IMPACT ON INTERSTATE AIR TRANSPORTATION

The members of the Cargo Airline Association are companies that provide expedited, time-certain, transportation services to businesses and individuals throughout the United States and the world. Indeed, today's air cargo business provides such service to every address in the United States. Over the past twenty-five years, the all-cargo component of the air transportation industry represented by the Association has grown explosively in response to the needs of American business and individual shippers. Today, industry members[4] have annual revenues over $25 billion, employ over 400,000 full-time equivalent individuals and operate approximately 850 large jet aircraft and an equal number of small "feeder" aircraft enabling the smallest communities access to the world's economy.[5] The service provided has enabled businesses to remain competitive in a world-wide economy by relying on a system of Just-In-Time inventory control, made possible by the time-definite services provided by Association members and others in the marketplace.

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[4] The "industry" discussed, *infra*, includes only all-cargo aircraft and does not include the substantial amount of freight carried in the bellies of passenger aircraft.

[5] *See "The Economic Importance of the All-Cargo Air Carriers"*, prepared by Economists, Inc., Washington, D.C., July 1998.

As an element of the transportation provided, Association member companies supply all pickup and delivery functions integral to the movement of the freight. Shipper customers are billed for the entire journey from the initial pickup point to the ultimate delivery point; there is never a breakdown of the air and ground portions. Using a unique "hub-and-spoke" system, in which packages are picked up at a customer's door; transported by truck to an airport; flown to a hub where the packages are sorted by destination; flown by aircraft to a destination airport and then sorted and delivered by truck to the ultimate consignee, Association members are able to meet the most time-critical demands of American business. Many members of this industry are household names: Airborne, DHL, Federal Express and UPS. Some are less well known to the general public (BAX Global, Emery Worldwide and Kitty Hawk Aviation, for example), but provide the same integrated service to their shipper customers. These services are precisely what Congress envisioned when it enacted 49 U.S.C. § 40101 (formerly 49 U.S.C. § 1302), noting:

> . . . the Secretary of Transportation shall consider the following matters . . . as being in the public interest for all-cargo transportation:
>
> (1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to –
>
> (A) the present and future needs of shippers;
>
> (B) the commerce of the United States; and

(C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

And these services are precisely what the Ninth Circuit Court of Appeals recognized when it ruled that the trucking component of air transportation services is **not** a separate business, but rather is an integral part of "air transportation." *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991). In *Federal Express*, the Ninth Circuit found that:

> The trucking operations of Federal Express are integral to its operations as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes. Federal Express owes some of its success to its effective use of trucking as part of its air carrier service.
>
> * * * * *
>
> Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the

> demands of an increasingly inter-linked nation. Congress has freed it from the constrictive grasp of economic regulation by the states.

Federal Express, 936 F.2d at 1078.[6]

The Hawaii decision at issue herein seriously threatens this national scheme and failure to take review raises the very real possibility of significant rate increases and pricing chaos, with varying State and Local taxation necessarily resulting in different prices for the same service in interstate air transportation – depending solely on where the ground portion of the movement is provided.

C. THE DECISION OF THE SUPREME COURT OF HAWAII UNDERMINES A CONGRESSIONALLY MANDATED SCHEME OF REGULATION AND A PRIOR OPINION OF THIS COURT

In order to ensure that a viable nationwide system of air transportation is maintained, and that a chaotic scheme of uncoordinated Regional and/or Local taxation does not cripple the needed nationwide service, Congress has specifically preempted certain activities. One of the activities preempted is the State or Local taxation of gross receipts from air transportation. *See* 49 U.S.C. § 40116. The question in this case is whether this statute applies to the taxes imposed by the State of Hawaii.

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[6] Although *Federal Express* dealt with a different preemption statute than that at issue herein (49 U.S.C. App. § 1305(a)(1), now 49 U.S.C. § 41713), the legal and policy principles are the same.

The language of 49 U.S.C. § 40116 is clear and unambiguous. It states that:

> . . . a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on –
>
> (1) an individual traveling in air commerce;
>
> (2) the transportation of an individual traveling in air commerce;
>
> (3) **the sale of air transportation; or**
>
> (4) **the gross receipts from that air commerce or transportation.**

49 U.S.C. § 40116 (emphasis added).

The question remaining is whether a State may impose an excise tax on a portion of the sale of air transportation by segregating the "ground portion" of the movement. The grant of the Lynden Petition is necessary to resolve this important federal issue.

As noted above, this Court has already ruled on this issue – at least with respect to the application of a tax to an airline's entire gross receipts. *Aloha Airlines*, 464 U.S. 7. In that case, this Court noted that:

> . . . when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.

464 U.S. at 12. Therefore, the only issue now appears to be whether the slightly differing application of the tax in

this case mandates a different result from that reached in *Aloha*.

A review of the facts of this case leads to the conclusion that, while *Aloha* may be factually distinguishable from the instant case, it is legally identical. The State of Hawaii may not impose a gross receipts tax on the pickup and delivery portion of an air freight movement integral to the carriage of such freight by aircraft. Any other holding frustrates the intent of Congress in enacting 49 U.S.C. § 40116. For example, the legislative history of the preemption statute at issue herein specifically notes that State and Local taxation " . . . runs counter to the whole concept of uniformity . . . and the maintenance of a national air transportation system." 1973 U.S.C.C.A.N. at 1450. Failure to review and reverse of the decision of the Supreme Court of Hawaii in this proceeding will therefore seriously erode the system created by Congress and will narrow this Court's decision in the *Aloha* case.

The second issue raised by the Lynden Petition is simply whether the ground functions performed by an air carrier constitute "air transportation" and therefore cannot be legally severed from the integrated movement. We urge that, for the purpose of deciding whether the Hawaii excise tax is preempted by federal law, they **cannot** be so separated. Only by granting the Lynden Petition can this important principle of federal air transportation law be finally decided.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 40101 *et seq.*, defines "air transportation" as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C.

§ 40102 (a) (5). In turn, "interstate air transportation" is defined as:

> . . . the transportation of passengers **or property** by aircraft as a common carrier for compensation, or the transportation of mail by aircraft –
>
> . . .
>
> (B) when **any part** of the transportation is by aircraft.

49 U.S.C. § 40102 (a) (25) (emphasis added). No amount of semantic juggling by the Supreme Court of Hawaii can change the clear meaning of this language. The services provided by Petitioner, and all others similarly situated, must, for the purposes of analyzing the legality of the Hawaii tax, be considered "air transportation" from pickup to delivery – not merely from takeoff to landing. Any other finding ignores both the way in which cargo air transportation is provided and the specific language of 49 U.S.C. § 40102 (a) (25) which unambiguously provides that "air transportation" includes ground services when "any part" of the transportation is by aircraft. *See, e.g., City of Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770, 773-74 (D.C. Cir. 1961).

Finally, if there were any doubt about Petitioner's status in the federal scheme of regulation, that doubt should be eliminated by the fact that Lynden, although operating no aircraft itself, is regulated as an air carrier under Part 296 of the Department of Transportation's Economic Regulations, 14 C.F.R. Part 296. Accordingly, 14 C.F.R § 296.3 (1998) specifically provides that:

> An indirect cargo air carrier is any U.S. citizen who undertakes to engage indirectly in air

> transportation of property, and uses for the whole **or any part of such transportation** the services of an air carrier or a foreign air carrier that directly engages in the operation of aircraft under a certificate, regulation, order, or permit issued by the Department of Transportation or the Civil Aeronautics Board, or the services of its agent, or of another indirect air carrier.

14 C.F.R. § 296.3 (emphasis added). *See also* 49 U.S.C. § 40102 (a)(2); *DHL Corp. v. Civil Aeronautics Board*, 584 F.2d 914, 915 (9th Cir. 1978). The import of this regulation, in the context of this proceeding, is that the entirety of the service performed by Petitioner is regulated by the Department of Transportation **as air transportation.** As such, it is rendered immune from State and Local taxation by 49 U.S.C. § 40116.

IV. CONCLUSION

The issues raised by Petitioner, Lynden Air Freight, in this proceeding are far-reaching and involve the entire movement of air freight in interstate commerce. Failure to grant review will necessarily result in a chaotic, crazy quilt, of State and Local taxes on air transportation services, which will undermine the federal system of aviation regulation in the United States. In addition, permitting the decision of the Supreme Court of Hawaii to stand will substantially narrow the prior finding of this Court in *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7. Faced with these potential results, the Cargo Airline Association respectfully urges this Court to

grant the Petition for a Writ of Certiorari filed by Lynden Air Freight, Inc. on February 23, 1999.

Respectfully submitted,

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